Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1606

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

JOHN G. HEIMANN, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellants appeal from that portion of the unanimous judgment of the United States District Court for the Southern District of New York (statutory three-judge court), entered on February 28, 1977, declaring New York Banking Law § 268 constitutional under the interstate Privileges and Immunities Clause, Art. IV, § 2, and the Commerce Clause, Art. I, § 8, of the United States Constitution. Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court to affirm the judgment below, or, in the alternative, to dismiss this appeal.

Statement of the Case

New York Banking Law § 268 limits the sale of savings bank life insurance to state residents and individuals who regularly work in New York. The three-judge district court sustained § 268 against appellants' challenge under the inter-state Privileges and Immunities Clause on the ground that the statute was reasonably related to substantial governmental purposes (described in the court's earlier rejection of appellants' equal protection claim, A. 4a-7a†) and did not "penalize out-of-state citizens for the benefit of in-state citizens." A. 9a, 10a. The district court rejected appellants' Commerce Clause challenge on the ground that the statute did not "affirmatively regulate articles actually in interstate commerce." A. 12a. Drawing on the test enunciated by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the district court found § 268 to be an evenhanded regulation "to effectuate a legitimate [local] public interest," with only "incidental" effects on interstate commerce. *Ibid.* See also *Great Atlantic and Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366 (1976).

In this Court, appellants contend that the district court misinterpreted *Toomer* v. *Witsell*, 334 U.S. 385 (1948), and *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), in rejecting their Privileges and Immunities claim and *Great Atlantic and Pacific Tea Co., Inc.* v. *Cottrell, supra*, in rejecting their Commerce Clause claim. Jurisdictional Statement, pp. 9-12.

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† References prefixed by the letter "A" refer to the Appendix to the Jurisdictional Statement filed on this appeal.

Appellants Do Not Present Any Claim Which Warrants Plenary Consideration By This Court.

A. The Interstate Privileges and Immunities Clause. Art. IV, § 2.

Appellants' Privileges and Immunities claim is met with the threshold deficiency that the statute sought to be invalidated does not adopt state citizenship, or, even state residence, as a classifying criterion. See *La Tourette* v. *McMaster*, 248 U.S. 465, 469-70 (1919). Section 268 makes savings bank life insurance ("SBLI") available to anyone who regularly works in New York regardless of his state citizenship on the same terms as it is made available to New York citizens.

Assuming the applicability of the Privileges and Immunities Clause *arguendo*, the validity of § 268 is easily demonstrated. As this Court stated in *Toomer* v. *Witsell*, *supra* at 396, the Privileges and Immunities Clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the *mere* fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." (Emphasis added.) Inquiry must be made in each case "with due regard for the principle that the States should have considerable leeway in analyzing local evils, and in precribing appropriate cures." *Ibid.* The district court made this specific inquiry, finding that § 268 was related to New York's substantial interests in regulating savings banks as local institutions, protecting savings banks and their "consumers" from permitting life insurance activities to prosper to the detriment of traditional banking functions, fairly allocating competition so that both the life insurance industry and the savings banks remain economically viable and enhancing the financial security of those who have an established

nexus with the state. A. 6a-7a, 9a.* The district court further found that the "mere fact" that certain out-of-state citizens were excluded by § 268 had nothing to do with the classification. A. 8a-9a, 22a n. 10.

Austin v. *New Hampshire, supra,* is not opposed. The overwhelming fact in that case was that the state imposed tax fell exclusively on the incomes of non-residents. 420 U. S. at 661, 665, 667 n.12. Herein, the out-of-state citizen and the in-state citizen are simply required to "be" in New York in some relevant sense, and both pay the same price for SBLI. The fact that an unqualified out-of-state citizen cannot obtain New York SBLI does affect, or "penalize," him any more than the limitations on his access to other state benefits which this Court has previously sustained. See e.g. *Spatt* v. *New York,* 361 F. Supp. 1048 (E.D.N.Y. 1973), aff'd 414 U.S. 1058 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Starns* v. *Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), aff'd 401 U.S. 985 (1971), all involving economic preferences for in-state residents pursuing higher education. Accord, *American Commuters Assoc. Inc.* v. *Levitt,* 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd 405 F.2d 1148 (2d Cir. 1969), sustaining economic preferences for New York residents under Privileges and Immunities Clause.

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* Appellants challenge the district court's acceptance of these state interests on two grounds: the court ignored a pertinent stipulation between the parties and the interests are hypothetical. Jurisdictional Statement, pp. 9-10. The referenced stipulation, entered into by the Assistant previously assigned to the case on behalf of appellee Heiman's predecessor in office, Superintendent Albright, stated, in substance, that Superintendent Albright had no personal knowledge of the legislative purposes served by § 268. It was, therefore, properly discounted by the district court. With respect to alleged hypothetical nature of the state interests involved, appellant fails to advise the Court that there was an extensive record before the district court supporting these (and additional) state interests. That record is only briefly referenced in the opinion at A. 22a n. 12 and n. 13. Moreover, the relevant test of reasonableness does not require factual demonstration but is that established by this Court in *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961) and related cases as the district court found (A. 5a-7a).

B. The Interstate Commerce Clause. Art. I, § 8.

The regulation of the savings bank-policyholder relationship encompassed in § 268 is outside the purview of the Commerce Clause. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15; *Prudential Insurance Company* v. *Benjamin,* 328 U.S. 408 (1946); opinion of the district court, A. 11a.

Assuming the applicability of the Commerce Clause *arguendo,* § 268 is valid under that Clause for substantially the same reasons it is valid under the Privileges and Immunities Clause.* We note initially, however, that even if SBLI is an article of commerce, it is not an article *in* interstate commerce. Rather, it is the force of appellants' position in this lawsuit that SBLI ought to be in interstate commerce. Appellee's research has not disclosed any authority for the proposition that the Commerce Clause affirmatively requires a state, or private manufacturer, to place an article into interstate commerce. Compare *Great Atlantic and Pacific Tea Co., Inc.* v. *Cottrell, supra* (Mississippi restrictions on "incoming" Louisiana Milk invalidated). In reaching the "merits" of the Commerce Clause claim, the district court applied the standards established by this Court in *Pike* v. *Bruce Church Inc.,* 397 U.S. 137 (1970) and *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). Opinion of the district court, A. 12a. Appellant does not dispute the appropriateness of these standards but differs only with the court's assessment of the substantiality and local nature of the supporting state interests. As discussed above, pp. 3-4, there is no basis for the assignment of error in this regard.

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* The district court assumed the McCarran-Ferguson Act was not applicable for purposes of its disposition. A. 11a-13a. Compare Jurisdictional Statement, p. 9 n. 7.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment below affirmed.

Dated: New York, New York
August 22, 1977.

Respectfully submitted,

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